Supreme Court, U.S.
FILED

97-1413 FEB 24 1998

OFFICE OF THE CLERK

No.

October Term 1997

IN THE
SUPREME COURT OF THE UNITED STATES

HUEY LOVE
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT ERRED IN DETERMINING THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REJECTING A PLEA AGREEMENT AS BEING UNDULY LENIENT FOLLOWING THE DEFENDANT'S OBJECTIONS TO THE BASE OFFENSE LEVEL PROPOSED IN THE PRESENTENCE REPORT.

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Fed.R.Crim.P.11(e)6(D)
21 U.S.C. 841(a)1 and (b)1(A)
21 U.S.C. 846

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the 8th Circuit **United States v. Love, 131 F3d 144, 8th Circuit 1997, unpublished.**

Table, unpublished, is attached hereto and incorporated herein. See Appendix.

JURISDICTION

Opinion and judgment of the United States Court of Appeals for the 8th Circuit was handed down November 26, 1997, affirming the judgment and decisions of the United States District Court for the Western District of Missouri, in accordance with the **U.S. Sup. Ct. R. 13.4.** This petition for Writ of Certiorari was initially filed in this Court within 90 days of the date in which the United States Court of Appeals for the 8th Circuit filed its Opinion affirming the District Court. The jurisdiction of the District Court was originally invoked pursuant to **21 U.S.C. 846** and **21 U.S.C. 841.** Petitioner invokes the jurisdiction of this Court pursuant to **28 U.S.C. 1254(1), U.S. Sup. Ct. R. 13.1,** and **10.**

CONSTITUTIONAL PROVISIONS

There are no constitutional provisions at issue in this petition.

STATUTORY PROVISIONS

21 U.S.C. 846 and **841(a)1,** and **841(b)(1)(A).**

Provides as follows:

Any person who attempts or conspires to commit any offense

defined in this subchapter shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of attempt or conspiracy.

Fed.R.Crim.P. 11(e)(6)(D)

Provides as follows:

Any statement made in the course of plea discussions with an attorney for the government which does not result in a plea of guilty or which results in a plea of guilty later withdrawn.

STATEMENT OF THE CASE

This case came on before the District Court for the Western District of Missouri pursuant to a plea agreement (included in the Appendix herein) which provided for, in salient part, that the base offense level in the instant case would be the amount of cocaine that the government could have readily proved the Defendant conspired to distribute before the Defendant agreed to cooperate with the government on September 1, 1993, Plea Agreement of December 20, 1993, p6 (Appendix).

Following receipt of the presentence report, the government conceded that its evidence, admissable under the aforesaid provisions of the plea agreement, did not support proposed the base offense level in the presentence report, that is more particularly level 32.

Following this announcement, the Court rejected the original Plea Agreement of December 20, 1993 by its order of November 4, 1996 following which the Defendant entered a conditional plea deleting the language of paragraph 6 of the December 20, 1993 Plea Agreement (Addendum to Plea Agreement of May 15, 1997, Appendix), which permitted the Court to consider evidence which would support the original proposed base offense level of 32, contrary to the original plea agreement of December 20, 1993.

This action of the District Court in rejecting the original plea agreement based upon Defendant's challenge to the proposed base

offense level was appealed to the United States Court of Appeals for the 8th Circuit which affirmed the District Court.

The original Plea Agreement provided in substance for a bar by the government pursuant to **Fed.R.Crim.P. 11(e)(6)(D)** and **U.S.S.G. 1B1.8** that any statement made to the government after September 1, 1993 may not be used in the calculations of the Defendant's statement. Further, the Plea Agreement stated that the parties agreed that the base offense level should be the amount of cocaine, which the government could have readily proved the Defendant conspired to distribute before September 1, 1993.

Following the Plea Agreement, the case came on for disposition after the preparation of a presentence report, to which the Defendant made specific objections as to the calculation of the base offense level.

Both the Defendant and the government filed sentencing memorandums addressing the specific issue of the Plea Agreement and the base offense level. The government conceded in its memorandum that it did not believe that it could offer support of the challenged base offense level in view of the restrictions placed on the evidence by the plea agreement. (See Court's order of 11/4/96, Appendix.)

REASONS FOR GRANTING THE WRIT

Pursuant to **U.S. Sup. Ct. R. 10(a)** petitioner believes that the decision of the United States Court of Appeals for the 8th Circuit is in conflict with the United States Court of Appeals for the 11th Circuit in its decision in **United States v. Boatner, 966 F2d 1575 (11th Circuit 1992)** which held that the government can enter into a binding Plea Agreement restricting the facts upon which a sentence is based, **Boatner at 1578-79.**

In addition, petitioner believes that the ruling of the United States Court of Appeals for the 8th Circuit in the instant case is in conflict with the United States Court of Appeals for the 5th Circuit in its decision in **United States v. Foy, 28 F3d 464 (5th Circuit 1994).**

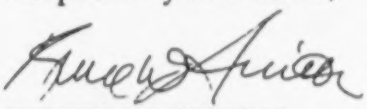
In this case, the 5th Circuit concluded that the rejection of a Plea Agreement based solely upon the Defendant's challenge to a disputed guideline level would constitute abuse of discretion as the sentencing guidelines contemplated such challenges, **Foy at 472.**

The petitioner believes that it is necessary that this Court clarify the conflict between the Court of Appeals for the 5th Circuit, 11th Circuit and 8th Circuit in order to provide guidelines in setting the parameters of the specific negotiating limits for plea agreements in the United States District Courts.

CONCLUSION

The petitioner respectfully requests this Court to issue its Writ of Certiorari to review the Opinion and Judgment (See Appendix) entered by the United States Court of Appeals for the 8th Circuit in this case and to clarify the apparent conflict of the Circuits in cases interpreting the scope of plea agreements and the scope of negotiating plea agreements and objections thereto predicated on the sentencing guidelines and challenged base offense levels.

Respectfully submitted,



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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

In accordance with Rule 29.4(a) and 29.3, I hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari have been served on the office of the Solicitor General, Department of Justice, Washington, D.C., 20530 and the United States Attorney for the Western District of Missouri, 1201 Walnut Street, Suite 2300, Kansas City, Missouri 64106.

I further certify that all parties required to be served, have been served.

BRUCE W. SIMON
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801 Walnut Street
Kansas City, MO 64106
(816) 471-3430

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,	) No. 93-00162-05-CR-W-6
	)
Plaintiff,	) OFFENSE:
	) Count One: Conspiracy to
v.	) distribute cocaine
	) (Class A Felony)
HUEY J. LOVE,	)
	) STATUTORY MAXIMUM
Defendant.	) INCARCERATION:
	) Life
	) (21 U.S.C. §§ 841(b) (1) (A)
	) and 846)
	)
	) STATUTORY MINIMUM
	) INCARCERATION:
	) Ten Years
	) (21 U.S.C. §§ 841(b) (1) (A)
	) and 846)
	)
	) STATUTORY MAXIMUM
	) FINE:
	) $4,000,000
	) (21 U.S.C. §§ 841(b) (1) (A)
	) and 846)

PLEA AGREEMENT

1. The parties to this agreement are Huey J. Love, the defendant, by and through counsel Bruce W. Simon and the United States Attorney for the Western District of Missouri, Stephen L. Hill, Jr., by Peter M. Ossorio, Assistant United States Attorney.

2. The charge to which defendant Huey J. Love shall tender a plea of guilty is as follows: Count one of the Indictment, conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841(a) (1), 841(b) (1) (A) and 846.

3. Defendant agrees to continue to provide full and complete cooperation in the investigation and prosecution of other persons who have committed offenses against the laws of the United States. This assistance shall include, but is not limited to, meeting with federal agents and providing complete and truthful statements regarding defendant's involvement in and knowledge of violations of federal narcotics, money laundering and racketeering laws or any offenses related to such activities, complete and truthful testimony before one or more federal grand juries and complete and truthful testimony at court hearings, trials or other proceedings deemed necessary by the government.[1] In the event the defendant gives false, incomplete or misleading testimony, he shall be in violation of this agreement.

4. The defendant understands that his plea of guilty to 21 U.S.C. § 846 will result in the imposition of at lease a five (5) year term of supervised release upon his release from incarceration. The defendant further understands that violation of the terms of his supervised release may result in additional imprisonment.

5. The government will retain the right to recommend a specific sentence of fine within the applicable guideline range as well as the right to argue to the Court any position it deems appropriate regarding the sentencing calculations in this matter. The government will advise the Court of the nature and extent of cooperation the defendant has provided.

* The word "government" in this agreement refers exclusively to the United States Attorney for the Western District of Missouri. Defendant agrees that, at the government's sole option, he will voluntarily sign releases to enable the government to verify his financial status and that he will submit to a polygraph examination regarding his allegations or denials of criminal conduct by himself and others.

6. Agreement regarding charges and offense level.

a. The United States Attorney for the Western District of Missouri agrees not to pursue additional charges resulting from the present offenses/investigation in the Western District of Missouri.

b. The United States Attorney for the Western District of Missouri agrees that under Federal Rule of Criminal Procedure 11(e) (6) (D), Federal Rule of Evidence 410(4) and Section 1B1.8 of the Sentencing Guidelines no truthful statement made by defendant on or after September 1, 1993, to Special Agent Leslie Gardner or other law enforcement officials will be used against him in determining the sentence in this case.

c. Defendant agrees that on February 8, 1991, defendant plead guilty to a felony drug offense within the meaning of 21 U.S.C. §§ 841(b) (1) (A), (b) (1) (B) and 851, in the Circuit Court of Jackson County, Missouri in Case CR90-2422. Defendant further agrees that this conviction shall be used, without further evidence or proof, by the Court in determining defendant's Criminal History Category. The government agrees not to seek an enhanced statutory minimum penalty under 21 U.S.C. §§ 841 (b) (1) (A) and 841 (b) (1) (B) and that is will not file an information under 21 U.S.C. § 851 (a) (1).

d. The parties agree that the base offense level in this case should be the amount of cocaine which the government could have readily proved defendant conspired to distribute before defendant agreed to cooperate with the government on September 1, 1993.

e. In the event that the defendant breaches or violates this agreement or otherwise fails to adhere to its terms, the government shall not be bound by this paragraph and may pursue any additional charges arising from the criminal activity under investigation as well as any perjury, false statement or obstruction of justice charges that have resulted. The defendant understands and agrees that in the event he violates this agreement, all statements made by him to law enforcement agents subsequent to September 1, 1993, any testimony given by him before a grand jury or any tribunal or any leads from such statements or testimony shall be

admissible against him in any and all criminal proceedings. The defendant waives any rights which might be asserted under the United States Constitution, any statute, Federal Rule of Criminal Procedure 11(e) (6), Federal Rule of Evidence 410, Section 1B1.8 of the Sentencing Guidelines or any other federal rule that pertains to the admissibility of any statements made by him subsequent to this agreement.

7. The parties agree that a three-level reduction for acceptance of responsibility is appropriate based on his cooperation to date in providing information in this matter. This determination, however, shall ultimately be made by the Court at the time of sentencing and the defendant understands that the Court is not bound by this paragraph. Defendant further understands that a guilty plea by itself does not constitute "acceptance of responsibility."

8. The parties have not reached any agreement regarding the amount of cocaine to be used in making the guideline calculations under Section 2D1.1, nor any agreement regarding role in the offense under Section 3B1.1. The parties agree that there is no adjustment for obstruction, pursuant to § 3C1.1. It is further agreed that the defendant has a Criminal History Category score of III. The defendant understands these calculations and estimates are agreements between the parties only and that the Court is not bound by them. Defendant further understands the Court will determine his base offense level, what adjustments, if any, which should be made to his offense level and his Criminal History score. Failure of the Court to adopt these stipulations will not provide defendant with a basis to withdraw his plea of guilty.

9. "Substantial assistance" within the meaning of 18 U.S.C. § 3553(e) already has been provided by the defendant. Therefore, the government shall request the Court to reduce the sentence defendant would otherwise receive under the applicable statutes and/or sentencing guidelines pursuant to 28 U.S.C. § 994(n), 18 U.S.C. § 3553(e) and Sentencing Guidelines Section 5K1.1. The government reserves the right to make the sole determination as to whether to request a reduction generally or a specific sentence or sentence reduction.

10. In exchange for defendant's agreement to cooperate with the government, the government agrees under Section 1B1.8 of the Sentencing Guidelines not to use new information that defendant provides about his own criminal conduct against him at sentencing in this case. Such information, as well as the information he has already provided, may be revealed to the Court but may not be used against the defendant in determining defendant's sentence range, choosing a sentence within the range, or departing from the range. There shall be no such restrictions on the use of information: (1) known to the government before September 1, 1993; (2) revealed to the government by, or discoverable through, an independent source; (3) in a prosecution for perjury or giving a false statement; or (4) in the event there is a breach of this agreement.

11. A. If defendant fails to keep any promise in this agreement, the government, at its option, may:

(1) enforce the agreement as to defendant's plea of guilty only and argue any position it deems appropriate regarding sentencing, or

(2) void the entire agreement and reinstate the original charges and bring any other charges it could have brought prior to this agreement, or

(3) if sentencing has occurred, petition the court for re-sentencing on the charges to which defendant pleaded guilty. The restrictions on the sentence contained in this agreement will not apply at any such re-sentencing.

B. Defendant agrees that if defendant fails to keep any promise made in this agreement, defendant waives:

(1) the right not to be placed twice in jeopardy for the offense(s) to which defendant entered a plea of guilty or which were dismissed or not instituted under this agreement;

(2) any right under the Constitution and laws of the United States to be charged or tried in a more speedy manner for any charge that is brought as a result of defendant's failure to keep this agreement;

(3) the right to be charged within the applicable statute of limitations period for any charge that is brought as a result

of defendant's failure to keep this agreement, and on which the statute of limitations expired after defendant entered into this agreement.

12. The defendant agrees not to appeal or otherwise challenge the constitutionality or legality of the Sentencing Guidelines.

13. The defendant agrees at the time of sentencing to deliver to the United States Attorney's Office, Debt Collection Unit, 1201 Walnut Street, Suite 2200, Kansas City, Missouri, a check payable to the Department of Justice in the amount of the mandatory special assessment ($50.00) required by law for the count to which he has entered a plea of guilty.

14. The parties have reached no agreement regarding the imposition of a fine or the amount of that fine, imposition of the costs of his sentencing and imprisonment or the amount of those costs, or the imposition of the costs of his term of supervised release or the amount of those costs.

15. The defendant has read the agreement, understands it, and by his signature, states that it is true and accurate and not the result of any threats or coercion. Both parties agree that no promises or agreements have been made other than those set forth in the agreement nor has the government promised the defendant any additional consideration to induce him to sign this agreement.

Stephen L. Hill, Jr.
United States Attorney

By

Dated: 20 December 1993

Peter M. Ossorio
Assistant U.S. Attorney

Dated: 20 Dec 1993

Bruce W. Simon
Attorney for Defendant

Dated: 20 Dec. 1993

Huey F. Love
Defendant

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 93-00162-05-CR-W-6
HUEY J. LOVE, Defendant.	)	

ORDER

For reasons discussed in a telephone conference with counsel, the court rejects the plea agreement and gives defendant an opportunity to withdraw his plea. SO ORDERED.

The inability to use Taylor as the source of incriminating evidence was apparently not anticipated by the Government, and the remaining evidence against defendant under the plea agreement unduly minimizes defendant's culpability. Rejection of the agreement is not in my judgment unfair to defendant because at any sentencing after a plea or conviction the court would doubtless be able to do the "right thing," by departure or otherwise, based on the highly unusual circumstances of this case.

The sentencing scheduled for November 4, 1996, will not be removed from the docket, but will be taken from the docket if (1) defendant withdraws his plea or (2) either side requests time to reanalyze sentencing circumstances. SO ORDERED.

Howard F. Sachs

HOWARD F. SACHS
United States District Judge

Dated: NOV 04 1996, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	No. 93-00162-05-CR-W-6
HUEY J. LOVE, Defendant.	)	

ADDENDUM TO PLEA AGREEMENT OF DECEMBER 20, 1993

COMES NOW the parties hereto, Huey Love, the defendant, by and through counsel of Bruce W. Simon and the United States Attorney for the Western District of Missouri, Stephen L. Hill, Jr., by D. Michael Green, Assistant United States Attorney.

On December 20, 1993, the parties hereto entered into a plea agreement which is attached and incorporated by reference and made a part hereof as if fully set forth.

On November 4, 1996, this cause appeared before the Honorable Howard F. Sachs, United States District Judge, for sentencing, and on that date the Court rejected the plea agreement of December 20, 1993 by its written order of that same date.

At the time of sentencing, November 4, 1996, the Government advised the Court that due to the evidentiary restrictions imposed by the December 20, 1993 plea agreement, more particularly, paragraph 6, sub-paragraphs b., d., and e., and paragraph 10, therein, that the Government would not be able to provide evidentiary support for the base offense level in the presentence report, which level had been challenged by the defendant.

The parties are desirous of entering into this conditional plea to determine whether the District Court's rejection of the December 20, 1993 plea agreement was proper or whether the rejection constituted an abuse of the Court's discretion.

The parties are desirous of entering a conditional plea pursuant to Fed. R. Crim. P. 11(a) (2) in order to preserve the defendant's right to appeal from the Court's rejection of the December 20, 1993 plea agreement. If the defendant is successful in this appeal, he shall have the right to be sentenced pursuant to the December 20, 1993 plea agreement.

To that end, the parties have agreed, by this conditional plea, to reserve to the defendant the right to appeal from the District Court's rejection of the December 20, 1993 plea agreement, to plead anew and to conditionally delete the language of paragraph 6, subparagraphs b., d., and e., and paragraph 10 from the plea agreement of December 20, 1993. In the event that the Court of Appeals should determine that the District Court abused its discretion in rejecting the December 20, 1993 plea agreement, then this matter shall be remanded for resentencing only pursuant to the provisions of the aforesaid paragraphs 6 and 10 of the plea agreement of December 20, 1993. In the event the Court of Appeals should affirm the District Court's rejection of the December 20, 1993 plea agreement, then any sentence defendant has received as a result of his plea to the new plea agreement shall become final.

The parties hereto agree that the defendant shall be permitted to remain at liberty or bond pending appeal subject to approval of the Court.

By

Date: 5/15/97 _____

D. Michael Green
Assistant U.S. Attorney

Date: 5/15/97 _____

Huey J. Love
Defendant

Date: 5/15/97 _____

Bruce W. Simon
Attorney for Defendant

United States Court of Appeals
FOR THE EIGHT CIRCUIT

No. 97-2630WM

United States of America,	*	
Appellee,	*	Appeal from the United
	*	States District Court for the
	*	Western District of Missouri
v.	*	
	*	
Huey J. Love	*	(UNPUBLISHED)
Appellant.	*	

Submitted: November 18, 1997
Filed: November 26, 1997

Before FAGG, WOLLMAN, and HANSEN, Circuit Judges.

PER CURIAM.

Huey J. Love appeals his drug-related sentence. Love contends the district court abused its discretion in rejecting the plea agreement as unduly lenient. A review of the record shows that Love's claim is unsupported by the record and without legal merit. We thus affirm Love's sentence without further discussion. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.